SUPREME COURT OF THE UNITED STATES.

No. 119.

DECEMBER TERM, 1867.

GILBERT & SECOR vs. THE UNITED STATES.

AGREEMENT OF COUNSEL TO AMEND RECORD.

1 At a Court of Claims held at the Capitol, in the city of Washington, on Wednesday, the 25th day of April, A. D. 1866.

GILBERT & SECOR
vs.
THE UNITED STATES.

The above-entitled cause is submitted on petition of appeal to the Supreme Court of the United States.

At a Court of Claims held at the Capitol, in the city of Washington, on Thursday, the 21st day of June, A. D. 1866.

GILBERT & SECOR
vs.
THE UNITED STATES.

The appeal in the above-named case is allowed, and ordered to be certified as prayed for by claimants in their petition.

A true copy of record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this 17th day of October, A. D. 1866.

[SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk of Court of Claims.

Attest:

JOS. CASEY, *Chief Justice.*

2 In the Supreme Court of the United States.—December term, 1867.

J. S. GILBERT *et al*
vs.
THE UNITED STATES. } No. 119.

It is stipulated that it appears by the record in this case that on the 21st day of June, A. D. 1866, the Court of Claims allowed the appeal prayed for by the claimants in their petition set forth in the transcript, and ordered the statement and specification of the alleged errors contained in the said petition to be certified to the Supreme Court of the United States.

It is further stipulated, that the transcript be taken as amended in this behalf, as if upon certiorari.

E. P. NORTON,
Solicitor for the United States.

CARLISLE & McPHERSON,
For App'e.

Supreme Court of the United States.

DECEMBER TERM, A. D., 1867.

GILBERT & SECOR, APPELLANTS,
vs.
THE UNITED STATE. } No. 119.

Brief for Appellants.

This is an appeal from a judgment of the Court of Claims, sustaining a demurrer to the petition of the appellants in that court, and dismissing the petition.

The case.

The petition in this cause is unfortunately swollen to unwieldy dimensions by the incorporation of long documents, which should have been appended as Exhibits; the case thus stated, however, is briefly this.

1. On the 3d of March, 1847, an act of Congress was passed directing the Secretary of the Navy to cause to be constructed at Pensacola, Florida, at Philadelphia, Pennsylvania, and at Kittery, Maine, a floating dry dock, and appropriating certain sums of money "towards said dock," at each place. Record, p. 1.

2. The department invited proposals for building said docks from John T. Gilbert, one of the appellants, and from others. Record, p. 1.

3. The appellant "for himself and associates," made proposals for building a floating dry dock, on the plan called *the balance dock*, at each of the three places mentioned. Record, p. 3.

The dock described in this proposal for Kittery, was to be 300 feet long, 85 feet wide, and 36 feet deep; it was not to be coppered, but to be covered with felt and tarred sheating. Record, p. 8.

The price proposed was $275,000. Record, p. 11.

A proposal was also invited by the department and furnished by the appellants, for a stone basin, and railway; the price was $200,000, with $10,000 for an iron floating gate. Record, p. 11.

4. The whole subject was elaborately considered by a board of officers appointed by the department, and the proceedings set out in the petition. Record, pp. 14 to 48.

The board was opposed strongly to the adoption of any floating dock, prefering the excavated stone dock, (Rec., p. 37) but reported fully on the merits of two floating docks submitted to their examination, a "sectional" dock and a "balance" dock, and gave the preference to the balance dock of the appellants. (Rec., p. 36.)

Both these were patented inventions, and the Secretary of the Navy finding that neither could be built at either place for the sums appropriated, submitted to the Attorney General the question whether, under the act of 1847, he was authorized to contract with the proprietors to build the docks for the prices demanded by them.

To this the Attorney General answered in the negative. Record, pp. 45, 48.

The Secretary then declined to make any contract. Record, pp. 45, 48.

And the President reported all the proceedings to Congress, Dec. 22, 1847. Record, p. 14.

5. On the 3d of August, 1848, Congress passed another act on this subject, in which the Secretary of the Navy is directed, *in the execution* of the act of March 3, 1847, an *in pursuance* of the report of the board of officers, hereinbefore referred to, to enter forthwith into a contract with Dakin & Moody, for the construction of a sectional floating dry-dock, basin, and railways, at Philadelphia, according to the plans and specifications submitted by them to the Department.

And, with Gilbert and Secor for a balance floating dry-dock, basin, and railways, at Pensacola, according to the plan and specifications submitted by them to the Department.

"And also to enter into a contract with one or the other of the respective parties above named," for the complete construc-

tion, * * * at the navy-yard, at Kitting, "of a floating dry-dock, basin, and railways, upon either of the above named plans that the said Secretary may pefer, as best adapted to said yard, to be of the largest dimensions proposed in said plans and specifications. *Provided*, that in each case such contract can be made at prices that shall not exceed, by more than 10 per cent., the prices which have been submitted by either of the said proprietors to the Navy Department, for a floating dry-dock on either of said plans, and for a basin and railways of the dimensions aforesaid, at any of said navy-yards.

"*And provided further*, That the said Secretary shall also by further contract with said parties, enlarge the dimensions of said works, at each yard, to a capacity sufficient for docking war steamers of the largest class, at least three hundred and fifty feet in length, if the dimensions above mentioned should not be found adequate for that purpose." Rec., pp 48, 49.

6. The Secretary of the Navy selected the balance dock as the one best adapted to the Kittery Navy Yard, (Rec. 49,) and thereupon the appellants made arrangement and contracts for the building of the dock. The dimensions of the dock proposed were inadequate to dock a steamer 350 feet in length. Rec., pp. 50, 51.

7. The Secretary of the Navy afterwards caused a contract and specifications to be drawn out for the signature of the appellants, and therein provided that the dock should be sheathed with copper, but allowed no price therefor, but simply increased the price of the dock, basin, and railway, in proportion to the increase of their dimensions, without regard to the change of material for sheathing. Rec., pp. 51, 52, 53.

In the preamble of the contract, the Secretary states that he has determined to select the "balance dock, in consideration that the appellants would copper-fasten it." Record, p. 52.

And in fixing the price, it is expressly stated that the "aforesaid price" is increased "in proportion to the increased area," and by the addition of 10 per cent, authorized by the act. Record, p. 53.

8. The claimants objected, and protested that the imposition of the condition, requiring them to copper-fasten the dock, was not warranted by law; nevertheless they signed the contract. Record, p. 51.

9. The appellants built the dock, basin and railways and received the agreed price therefore. They also copper-sheathed and copper-fastened the dock at an expense of $72,742 82, over and above what it would have cost to sheathe and fasten in the manner provided in the original specifications, and this suit is brought to recover this sum.

Points.

1. The true intent of the act of Congress was to accept the proposition made by the parties named in the act, with two modifications, the first to allow them an increase of ten per cent. over the prices proposed the year before; (it being no doubt understood that prices of labor and material had advanced in the meantime); and the second to increase the size of the dock to the dimensions specified. Except in these particulars, all the terms of the contract were contained in the proposal ot the appellants, and accepted by the act.

2. The provision to enlarge the dock did not authorise the department to require of the contractors a different or more expensive sheathing.

3. When the Secretary determined that the balance dock was best adapted for Kittery; the appellants, under the act of Congress, instantly became entitled to execute the work upon the plans and specifications already presented by them, and with the modifications prescribed by the act; that is to say: to build a dock sufficent to dock a war steamer of the largest class, at least 350 feet in length, and to receive a price therefor based upon the price originally proposed by them, increased by ten per cent. and further increased in the proportion which the enlarged dock bore to that originally specified.

4. The last clause of the act cannnot be understood to give the Secretary unlimited authority to pay any sum however large for the enlarged dock. The proviso that he should not

exceed the former price more than ten per cent. must be understood to limit his authority, as well in regard to the enlarged dock, as to the smaller, and this limitation could take effect only by construing the act—as the parties at the time construed it—to require the price of the enlarged dock to be fixed by computation in exact proportion to its size; and if the act limited the price to be paid, it also prescribed the work for what the price should be paid.

C. CUSHING,
J. M. CARLISLE,
J. D. McPHERSON,
Of counsel for Appellants.

Supreme Court of the United States.

DECEMBER TERM, 1867. No. 119.

JOHN S. GILBERT and ZENO SECOR, Appellants,

VERSUS

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

E. D. NORTON,
Solicitor for the United States.

McGILL & WITHEROW, PRS.

Supreme Court of the United States.

No. 119.

JOHN S. GILBERT AND ZENO SECOR, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The appellants brought an action in the Court of Claims, founded upon what would seem to have been regarded by them as a peculiar equity, arising not from a contract between them and the United States, but from the neglect or the perverseness of the Secretary of the Navy in not making with them such a contract as they allege he was directed to make by an act of Congress.

The court will find in the record (pages 51 and 72, inclusive) a contract set out between the United States and the appellants, for the building of a floating dry-dock at Kittery, Maine. This contract was signed and sealed, and has been executed by the parties. The contract has been performed by the appellants, and the money due under it has been paid by the United States.

But it is contended that under certain statutes, and on account of certain transactions, although the statutes were proper, and the transactions occurred before the execution of the contract, the appellants are entitled to an additional sum, beyond the amount paid under the contract, of eighty-two thousand seven hundred and forty-two dollars.

There is a large mass of matter in the record, but there is a small portion of it which is necessary to an understanding of the case.

The appellants, as a part of their case, set out (Record, p. 1) an act of Congress, approved March 3, 1847, by which the Secretary of the Navy was directed "to cause to be constructed at each of the navy-yards at Kittery, Philadelphia, and Pensacola, a floating dry-dock for ships-of-the-line, with basins and railways at Philadelphia, and reference thereto at the other places, on such plans as may be preferred by the Secretary of the Navy. The said dock at Pensacola to be completed with all possible dispatch; and the sum of $50,000 is hereby appropriated towards said dock at Kittery; $50,000 towards said dock at Philadelphia; and $250,000 towards said dock at Pensacola, out of any money in the treasury not otherwise appropriated."

Proposals were made by one of the appellants, for himself and his associates, for the building of said dry-docks, and in the specifications (Record, p. 8) there is this clause:

"Inasmuch as there are no worms in the waters of the Delaware or at Kittery, and as the circular of the bureau does not indicate that those docks are to be coppered, we propose to dispense with the copper in our proposals for those two docks; substituting therefor, at Kittery, as in the dock now building at New York, felt and tarred sheathing."

The appellants also set out (Record, p. 48) the following section of an act of Congress, passed August 3, 1848:

"SEC. 3. *And be it further enacted*, That in the execution of the act approved March 3, 1847, making appropriations for the naval service, &c., for the year ending the 30th of June, 1848, directing, among other things, the construction of floating dry-docks at the navy-yards at Philadelphia, Pensacola, and Kittery, and in pursuance of the reports in favor of the two plans hereinafter named as best adapted to naval purposes, made by a board of officers appointed to examine all the plans, and by the Bureau of Yards and Docks, the Secretary of the Navy is hereby directed forthwith to enter into a contract with Samuel D. Dakin and Rutherford Moody, for the complete construction, within a reasonable time from the date of the contract, of a sectional floating dry-dock, basin, and rail-

ways, at the navy-yard at Philadelphia, according to the plan and specifications submitted by them to the Navy Department; and also to enter into a contract with John S. Gilbert and Zeno Secor for the complete construction, within a reasonable time from the date of the contract, of a balance floating dry-dock, basin, and railways, at the navy-yard at Pensacola, according to the plan and specifications submitted by them to the Navy Department; and also to enter into a contract with one or the other of the respective parties above named, for the complete construction, within a reasonable time from the date of the contract, at the navy-yard at Kittery, of a floating dry-dock, basin, and railways, upon either of the above-named plans that the said Secretary may prefer as best adapted to said yard; the said works at each yard to be of the largest dimensions proposed in said plans and specifications; *Provided*, That in each case such contract can be made at prices that shall not exceed by more than ten per cent. the prices which have been submitted by either of the said proprietors to the Navy Department for a floating dry-dock on either of said plans, and for the basin and railways, of the dimensions aforesaid, at any of said navy-yards; *And provided further*, That the said Secretary shall also, by further contract with said parties, enlarge the dimensions of said works at each yard, to a capacity sufficient for docking war steamers of the largest class, at least three hundred and fifty feet in length, if the dimensions above mentioned should not be found adequate for that purpose."

The appellants also allege, (Record, p. 50,) that on account of "subsequent attendance at Washington and other places, in relation to the construction of said dry-dock at Kittery, Maine, they had paid out and expended a large amount of money, and had used up a large amount of time, to them of great value and importance, and that some time elapsed after the selection of these claimants' dock under said afore-mentioned act of Congress, and having thus made said expenditure of time and money, and after said selection of said dock aforesaid of these claimants, and before said contract was entered in by these claimants and said Secretary of the Navy, they had, by reason of the passage of said act of Congress hereinbefore set forth, and the selection of these claimants' dock by said Secretary of the Navy, made arrangements and contracts for the faithful and successful carrying out of said

contract according to the plans and specifications that had been furnished by these claimants."

In the contract entered into between the appellants and the Secretary of the Navy acting for the United States, on the eleventh day of November, 1848, there is this clause, (Rec., p. 52:) "*And the Secretary of the Navy, in the execution of the aforesaid law, after mature deliberation thereon, and in consideration that the said parties of the second part will copper-fasten said dock at Kittery, according to the specifications for the Pensacola dock, hereto annexed, has determined to select, and does hereby select and adopt, the balance dock, basin, and railways of Gilbert and Secor, parties of the second part, as best adapted for the navy-yard at Kittery.*"

It is alleged, (Rec., p. 72,) that on the 26th of February, 1849, a written protest was filed in the Navy Department against the inserting of the above clause in the contract. It is stated in the protest that this clause, as well as the refusal by the Secretary of the Navy to allow for the enlarged area of the work, was discussed before the signing of the contract, but that, "after protesting for two or three days against a demand so unexpected as well as unjust, the contractors were at last compelled to submit to it, under the impression that they would otherwise fail to obtain any contract at all. After the great expense to which they had been subjected by their protracted applications, and under a strong protest, they executed the contract now on the files of the Department. They were induced to this course by the advice of friends and with a firm reliance upon the sense of justice of the Department to restore them to their equitable and legal rights, after time should be taken to examine the laws and all the facts applicable to the case."

The claim of the appellants has been before Congress, (Record, p. 79,) but no favorable action had been taken with regard to it.

The appellants have set out in their record (p. 80) a letter from the Secretary of the Navy, who entered into the contract, written about four years after its execution, and long

after he had ceased to be Secretary of the Navy, recommending the payment of the claim by Congress.

This letter is, of course, in no respect competent evidence. But even if the testimony of Mr. Mason had been taken, his opinion could have had no legal effect. His recommendation, even with the sanction of an oath, while it might have been respected by Congress, with its plenary power, cannot be regarded by a court, which has no jurisdiction except to enforce the *contracts* of parties.

Although this case involves a large amount, it is difficult to make it a subject of discussion. Here is a contract, made by competent parties, with a full knowledge of all the facts, and without duress. It has been completely executed by both parties.

All the maxims of the law must be reversed before a court of law or equity can give the relief demanded.

The petition of the appellants was properly dismissed upon demurrer by the Court of Claims. It would not require the reading of the able opinion of that court in this case (1 Nott and Huntington, 28) to justify the conclusion to which it arrived.

Neither a court of law nor equity can create a contract for parties in opposition to one written in precise terms. And, although in this case a court might think the executive officer, upon whom devolved the duty, by an act of Congress, of making a contract for the Government, exacted terms more favorable to the United States than those demanded by the act, it will not do the violent thing of destroying the contract actually made, and, by a construction of its own of the legislation of Congress, perform the functions delegated by law to the executive, rather than to the judicial department.

E. B. NORTON.

Solicitor for the United States.